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268 NLRB No. 149

D--1291 Louisville, KY

## UNITED STATES OF AMERICA

## BEFORE THE NATIONAL LABOR RELATIONS BOARD

LOUISVILLE GAS & ELECTRIC COMPANY

and

Case 9- CA--20013

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2100, AFL--CIO

## DECISION AND ORDER

Upon a charge filed by the Union on 18 August 1983, the General Counsel of the National Labor Relations Board issued a complaint on 23 September 1983 against the Company, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act.

The complaint alleges that on 29 September 1980, following a Board election in Case 9--RC--13451, the Union was certified as the exclusive collective-bargaining representative of the Company's employees in the unit found appropriate. The complaint also alleges that on 27 May 1983, following a Decision and Clarification of Bargaining Unit issued by the Regional Director for Region 9 in Case 9--UC--250, the unit was clarified to include the job classification of data record analyst. (Official notice is taken of the ''record'' in the unit clarification proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g), amended Sept. 9, 1981, 46 Fed.Reg. 45922 (1981); Frontier Hotel, 265 NLRB No. 46 (Nov. 9, 1982).) The complaint further alleges that since 20 July 1983 the Company has refused to

bargain with the Union as the exclusive collective-bargaining representative of the employees classified as data record analysts. On 5 October 1983 the Company filed its answer admitting in part and denying in part the allegations in the complaint, and raising certain affirmative defenses.

On 26 October 1983 the General Counsel filed a Motion for Summary

Judgment. On 31 October 1983 the Board issued an order transferring the

proceeding to the Board and a Notice to Show Cause why the motion should not
be granted. The Company filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer to the complaint, the Company admits that the unit was clarified to include the job classification of data record analyst, and it admits that it has refused to bargain with the Union as the exclusive representative of employees classified as data record analysts. However, the Company denies that its refusal to bargain is unlawful, and asserts as an affirmative defense that the data record analyst employees are ''managerial employees'' who are not properly included in the unit. The Company reiterates this contention in its response to the Notice to Show Cause. Counsel for the General Counsel contends that the Company seeks to relitigate issues previously considered in the underlying unit clarification proceeding.

Our review of the record herein, including the record in Case 9--UC--250, discloses that on 29 September 1980 the Union was certified as the exclusive representative of the Company's employees in the unit found appropriate. On 27 May 1983 the Regional Director for Region 9 issued a Decision and Clarification of Bargaining Unit which amended the Certification of Representative to include the job classification of data record analyst.

Subsequently, the Company filed with the Board a request for review of that decision, contending as it does here that the employees classified as data record analysts should be excluded as managerial employees. On 6 July 1983 the Board denied the Company's request for review.

It is well settled that in the absence of newly discovered and previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding.

See Pittsburgh Glass Co. v. NLRB, 313 U.S. 146, 162 (1941); Secs. 102.67(f) and 102.69(c) of the Board's Rules and Regulations.

All issues raised by the Company were or could have been litigated in the prior unit clarification proceeding. The Company does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the unit clarification proceeding. We therefore find that the Company has not raised any issue that is properly litigable in this unfair labor practice proceeding. Accordingly we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following Findings of Fact

## I. Jurisdiction

The Company, a Kentucky corporation, has been engaged as a public utility in the generation, transmission, distribution, and sale of gas, electricity, and related products at its facility in Louisville, Kentucky. The Company annually derives gross revenues in excess of \$250,000, and it annually purchases and receives products, goods, and materials valued in excess of \$50,000 directly from points outside the State of Kentucky. We find that the

Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

# II. Alleged Unfair Labor Practices

## A. The Certification and the Unit Clarification

On 29 September 1980 the Union was certified as the collective-bargaining representative of the employees in the following unit:

All employees of [the Company] engaged in operations, production, construction and maintenance, including meter readers, servicemen, collectors and inspectors, temporary and summer employees and Main Office custodial employee classifications, but excluding all other employees in the Commercial Department, Accounting Department, Market Service Department, right-of-way agents, cadet engineers, co-op students and internships, office clerical employees, and all professional employees, guards and supervisors as defined in the Act, as amended.

On 27 May 1983 the unit was clarified to include the job classification of data record analyst. The Union continues to be the exclusive representative under Section 9(a) of the Act.

## B. Refusal to Bargain

Since 20 July 1983 the Union has requested the Company to recognize and bargain with it as the exclusive representative of employees classified as data record analysts, and since 20 July 1983 the Company has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

### Conclusions of Law

By refusing on and after 20 July 1983 to bargain with the Union as the exclusive collective-bargaining representative of employees classified as data record analysts, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

## Remedy

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

#### ORDER

The National Labor Relations Board orders that the Respondent, Louisville Gas & Electric Company, Louisville, Kentucky, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Refusing to bargain with International Brotherhood of Electrical Workers, Local 2100, AFL--CIO, as the exclusive bargaining representative of the employees classified as data record analysts.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) On request, bargain with the Union as the exclusive representative of the employees classified as data record analysts with respect to terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.
- (b) Post at its facility in Louisville, Kentucky, copies of the attached notice marked ''Appendix.'' Copies of the notice, on forms provided by the

If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading ''POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'' shall read ''POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.''

Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C.

17 February 1984

Donald L. Dotson, Chairman

Don A. Zimmerman, Member

Robert P. Hunter, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

#### APPENDIX

### NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with International Brotherhood of Electrical Workers, Local 2100, AFL--CIO, as the exclusive representative of our employees classified as data record analysts.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees classified as data record analysts.

			LOUISVILLI	GAS	S &	ELECTRI	C COMPA	NY	
				(Employer)					
Dated		Βv							
		2 y	(Representative)	)		(	Title)		

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 3003, 550 Main Street, Cincinnati, Ohio 45202, Telephone 513--684--3663.